

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of Wiggins Telephone Association A Rural Telephone Company	)	CC Docket No. 96-45
	)	
	)	DA 03-2859
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To: The Commission		

**COMMENTS OF N.E. COLORADO CELLULAR, INC.**

N.E. Colorado Cellular, Inc. ("NECC"), by counsel and pursuant to the Commission's *Public Notice* dated April 12, 2004,<sup>1</sup> provides comments in the above-captioned proceeding. The Colorado Public Utilities Commission's ("COPUC") petition seeking the FCC's agreement with its service area redefinition of Wiggins Telephone Association ("WTA") was filed on May 30, 2003.

NECC has been advancing universal service and competition throughout substantial portions of northeastern Colorado, however not in WTA's service area. With federal high-cost support. NECC has upgraded its system with advanced digital capabilities, constructed new cell sites, and provided high-quality service to consumers, some of whom are choosing NECC's service as a replacement to rural ILEC service. Concurrence with COPUC's service area redefinition of WTA will permit NECC to move

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<sup>1</sup> *Parties Are Invited To Update The Record Pertaining To Pending Petitions For Eligible Telecommunications Carrier Designations*, DA-04-999 (April 12, 2004). These comments are filed with the Chief, Wireline Competition Bureau, who has delegated authority pursuant to 47 C.F.R. Section 54.207(e); *see also*, *Wireline Competition Bureau Initiates Proceeding to Consider the Colorado Public Utilities Commission Petition to Redefine the Service Area of Wiggins Telephone Association in the State of Colorado*, (Public Notice) DA 03-2859 (released September 9, 2003).

forward quickly to improve its network in WTA's service area to the benefit of Colorado's rural consumers.

As set forth below, the Commission should permit the COPUC's redefinition of WTA to become effective.

# **I. THE SCOPE OF A SECTION 54.207 PROCEEDING IS LIMITED**

*The case below was solely about whether the FCC should concur with the COPUC's decision to define WTA's service area so that each wire center is a separate service area. This case is not about defining NECC's ETC service area. That decision has been made by a final and unappealable order.*

In its decision, which is now a final and unappealable order, COPUC determined that it was in the public interest to grant ETC status to NECC for a defined service area within Colorado. In so doing, the MPUC exercised statutory authority that lies solely with the state. Determinations as to the contours of a competitive ETC's service area and whether the public interest would be served by designation of a competitive ETC are solely within the province of a state's jurisdiction to designate ETCs under 47 U.S.C. Section 214(e)(2). Thus, unless it has relinquished jurisdiction to the FCC, only a state may determine whether it is in the public interest to designate a competitor such as NECC in all or part of an ILEC's service area. Moreover, a state commission's public interest determination under Section 214(e)(2) is not a "statute, regulation, or legal requirement" and therefore is not subject to preemption by the FCC under Section 253(d).

WTA, through the Colorado Telecommunications Association ("CTA") actively participated in the proceeding that designated NECC as an ETC in rural Colorado.<sup>2</sup> In

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<sup>2</sup> See Docket Nos. 00A-315T and 00A-491T.

addition, WTA actively participated in the proceeding that disaggregated WTA's support down to the wire center level.<sup>3</sup> Both of these decisions are now final and unappealable orders. Thus, WTA has no right to pursue further appeals of COPUC's decisions here at the FCC, either directly or indirectly.

The COPUC's petition to the FCC seeking concurrence with its service area redefinition for WTA follows the framework set up by Congress in Section 214(e) of the 1996 Act and the Commission in Section 54.207 of the rules. The state and the FCC must agree on any redefinition of ILEC service areas made necessary by the designation of a competitive ETC in an area that is different from an ILEC study area. The scope of a redefinition proceeding under Section 54.207 is limited to criteria articulated by the Federal-State Joint Board on Universal Service ("Joint Board").

The Joint Board's stated concerns about redefining rural ILEC service areas have been in place for a number of years and have been addressed in numerous cases throughout the country, including the WTA proceeding in Colorado.<sup>4</sup> Under Section 54.207, neither the FCC nor the state has authority to dictate the service area redefinition of a rural ILEC. The parties must reach agreement.

## **II. THE FCC SHOULD FOLLOW COPUC'S WELL CONSIDERED DECISION TO REDEFINE WTA'S SERVICE AREA**

Concerns raised by the Joint Board focus on whether the proposed redefinition of rural ILEC service areas would, (1) permit NECC to intentionally or unintentionally cream skim low-cost areas of WTA, (2) impose any undue administrative burdens on

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<sup>3</sup> See Docket No. 02A-276T.

<sup>4</sup> See, Federal-State Joint Board on Universal Service (Recommended Decision), 12 FCC Rcd 87 (Jt. Bd., 1996).

WTA, or (3) properly recognize WTA's status as rural telephone companies. These concerns were thoroughly considered by COPUC. COPUC has conducted a full evidentiary hearing, replete with discovery, evidence and briefing, to determine whether WTA's support should be disaggregated to the wire center level. As provided for in the state's rules, when WTA's support was disaggregated to the wire center level, by rule its service area was redefined so that each wire center constitutes a separate service area.<sup>5</sup> Thus, given that WTA has already disaggregated support in a Path 2 proceeding, COPUC has ruled that concerns about cream skimming, or the effect of cream skimming, are moot.

The FCC should also concur with COPUC's proposed service area redefinition because the COPUC is in the best position to determine what is best for its rural citizenry. The state's closer oversight of telephone companies under its jurisdiction and its historical view of the state's telecommunications needs and infrastructure are substantial reasons why Congress delegated to state commissions in the first instance authority to perform ETC designations.

Here, the COPUC has found that disaggregation of high-cost support is sufficient to protect rural ILECs from competitors receiving uneconomic support levels, even unintentionally. Those that have disaggregated support are protected from uneconomic competition and those that have not disaggregated may still do so pursuant to 47 C.F.R. Section 54.315. COPUC has performed its duty in a complete and well-considered proceeding, pursuant to which all parties have had full opportunity to air their views.

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<sup>5</sup> See, 4 CCR 723-42-11 ("The Commission will use the disaggregation plans of each incumbent Eligible Telecommunications Carrier established pursuant to Rule 10 not only for disaggregation of Colorado HCSM support but also for the disaggregation of the study area of the rural incumbent local exchange carrier pursuant to 47 CFR Section 54.207 into smaller discrete service areas.")

WTA made no credible showing as to how it would, or could, be harmed by redefinition, and, as evidenced by COPUC's recent comments, nothing in either *Virginia Cellular* or *Highland Cellular* has persuaded the COPUC to alter its decision.<sup>6</sup>

The FCC is bound by statute to respect a state's judgement, made pursuant to 47 U.S.C. Section 214(e)(2), with respect to whether it is in the public interest to designate a competitor as an ETC in specific rural ILEC service areas. In addition, the FCC should respect the state's judgement regarding whether an ILEC service area should be redefined pursuant to Section 214(e)(5), especially where, as here, that decision has been made after careful consideration with all affected parties having had an opportunity to actively participate in the decision making process. Deferring to a state's expertise would be consistent with the FCC's recent request that the Virginia Corporation Commission examine the FCC's proposed service area redefinition of Virginia Cellular "based on its unique familiarity with the rural areas in question."<sup>7</sup>

### **III. CONCLUSION**

The COPUC has properly considered and reaffirmed its decision to redefine WTA's service area, by rule, consistent with its plan of disaggregation along wire center boundaries. Therefore, FCC concurrence is entirely appropriate. NECC respectfully requests the FCC to promptly issue an order concurring with the COPUC's redefinition of

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<sup>6</sup> See Supplement to Petition by the Colorado Public Utility Commission, filed with the FCC in this proceeding on May 14, 2004.

<sup>7</sup> *Virginia Cellular*, *supra* at 1582.

WTA's service area so that rural consumers in Colorado can begin to receive the benefits of high-cost support at the earliest possible date.

Respectfully submitted,

**N.E. COLORADO CELLULAR, INC.**

By: \_\_\_\_\_/S/ \_\_\_\_\_

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May 28, 2004

## **CERTIFICATE OF SERVICE**

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 28<sup>th</sup> day of May, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Comments of N.E. Colorado Cellular, Inc.* filed today to the following:

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